

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHARLES A. SEIBER, DAVID A. SHIPMAN, ROBERT J. LUCHETTI,
GREGG R. DRAUDT and PHILLIP M. HOBSON

Appeal No. 2001-0734
Application 09/071,264

ON BRIEF

Before COHEN, FRANKFORT, and NASE, Administrative Patent Judges.
FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 31 through 51.¹ Claims 1 through 12 and 15

¹Dependent claims 38 through 42, 49 and 51 have been amended subsequent to the final rejection. See amendments filed April 24, 2000 (Paper No. 14); May 30, 2000 (Paper No. 16); and June 5, 2000 (Paper No. 18).

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through 20, the only other claims remaining in the application, stand allowed. Claims 13, 14 and 21 through 30 have been canceled.

Appellants' invention is directed to a partition system for subdividing a building space. More specifically, the claims on appeal appear to be directed to the embodiment of the invention seen in Figures 77 through 83 of the application drawings wherein the partition system includes a floor-engaging channel (380). Independent claims 31 and 44 are representative of the subject matter on appeal and a copy of those claims may be found in Appendix A to appellants' brief (Paper No. 19, filed June 5, 2000).

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Pollock '386	3,958,386	May 25, 1976
Amstutz	4,991,368	Feb. 12, 1991

Claims 31 through 42 and 44 through 51 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Pollock '386.

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Claims 31 through 41 and 43 through 51 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Amstutz.

Rather than reiterate the examiner's full statement of the above-noted rejections and the conflicting viewpoints advanced by appellants and the examiner regarding those rejections, we make reference to the examiner's answer (Paper No. 21, mailed January 29, 2001) for the reasoning in support of the rejections, and to appellants' brief and reply brief (Paper No. 22, filed April 2, 2001) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we have made the determinations which follow.

Looking first to the examiner's rejection of claims 31 through 42 and 44 through 51 under 35 U.S.C. § 102(b) as being anticipated by Pollock '386, we must agree with the examiner that

the partition system seen in Pollock '386 is fully responsive to that defined in appellants' independent claims 31 and 44 on appeal. In that regard, we note that the partition system of Pollock '386 seen in Figure 9 includes an open-framework partition (distinct from that portion of the partition system carrying wall panel 110) wherein the partition includes an upper horizontal frame member (21) having a first horizontal row of discrete attachment points (e.g., 43 as seen in Figure 3, but un-numbered in Fig. 1) capable of supporting a furniture unit²; and a floor channel (20) like that defined in appellants' independent claims on appeal, having a second row of discrete attachment points (e.g., 42, 43 as seen in Figure 3, but un-numbered in Fig. 1) corresponding to the first horizontal row of discrete attachment points and also capable of supporting a furniture unit.

Contrary to appellants' arguments in their brief (pages 8 and 9), and as can be clearly seen in Figure 9 of Pollock '386,

² As noted on page 1 of appellants' specification, a "furniture unit" can be an additional partition or other accessory that is intended to be interconnected to the partition in locations in front of the partition.

the horizontal row of discrete attachment points in the upper horizontal frame member (21) and in the floor channel (20) of the open-framework partition seen in Figure 9 are not covered with any form of wall panel, floor panel or fasteners, and thus are fully capable of supporting a furniture unit, if so desired. The fact that these rows of attachment points are not shown in Pollock '386 (Fig. 9) as supporting a furniture unit or other accessory structure does not detract from the fact that they are fully capable of such a use. In that regard, we note that our Courts of review have repeatedly indicated that a recitation with respect to the manner in which a claimed apparatus or structure is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the structural limitations of that claimed. See, for example, In re Yanush, 474 F.2d 958, 959, 177 USPQ 705, 706 (CCPA 1973); In re Finsterwalder, 436 F.2d 1028, 1032, 168 USPQ 530, 534 (CCPA 1971); In re Casey, 370 F.2d 576, 580, 152 USPQ 235, 238 (CCPA 1967); and In re Otto, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963). Accord for this proposition is found in In re Schreiber, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997), wherein the Court noted that "it is well settled that the

recitation of a new intended use for an old product does not make a claim to that old product patentable."

Finding nothing in independent claims 31 and 44 on appeal which is not also present in Pollock '386, and no persuasive argument from appellants as to any distinguishing structure, we will sustain the examiner's rejection of claims 31 and 44 under 35 U.S.C. § 102(b) as being anticipated by Pollock '386.

Regarding claims 32 through 41 which depend from claim 31 and claims 45 through 49 which depend from claim 44, we note that appellants have not presented any separate argument for the patentability of these claims apart from that which was presented with regard to the independent claims (note, for example, the first paragraph on page 10 of the brief). Accordingly, we consider these dependent claims (i.e., claims 32 through 41 and 45 through 49) to fall with the respective parent claim from which they depend.

On page 10 of their brief, appellant's have presented separate arguments with respect to dependent claims 42, 50 and 51. Like appellants, we find that Pollock '386 does not disclose

or teach a floor channel wherein the apertures "are located at a corner defined by the bottom flange and the flat outer flange" (emphasis added) of the floor channel (claim 42), "at the corner" (emphasis added) as defined in claim 50, or "in the corner" (emphasis added) as set forth in claim 51. The apertures in Pollock '386 are clearly located in the central portion of the panels (31-34) seen in Figures 2 and 3 and in the planar panel (30) and spaced away from the corners of the floor channel. In our view appellants' claims noted above require the apertures to be in the corner (i.e., to occupy an area of the actual line where the floor channel legs or flanges of the floor channel meet) or to be at the corner (i.e., to have a portion that is in contact with the line where the floor channel legs or flanges of the floor channel meet). Finding no such apertures in Pollock '386, we will not sustain the examiner's rejection of claims 42, 50 and 51 under 35 U.S.C. § 102(b) as being anticipated by Pollock '386.

Turning next to the examiner's rejection of claims 31 through 41 and 43 through 51 under 35 U.S.C. § 102(b) as being anticipated by Amstutz, we again find ourselves in agreement with the examiner's position as regards appellants' independent claims

31 and 44. In this instance, we point to the open-framework partition seen in Figures 1, 3, 21 and 22 of Amstutz, noting that the row of discrete apertures (82) in the top rail or upper horizontal frame member (16) and the row of discrete apertures (62) in the bottom rail or floor channel (14) are fully capable of supporting a furniture unit therein. As for appellants' assertion (brief, page 12) that the discrete attachment points in the floor channel (14) cannot be used in such a manner because the floor channel is flush with the ground or floor (34), we merely point to Figures 16 and 17 of Amstutz to dispose of this argument, since the floor channel (14) is clearly shown in those figures as being spaced from the floor (34).

Moreover, we note that the vertical struts (18) of Amstutz include projections (64, 65) that are indicated to be received in the apertures (62) of the floor channel and apertures (82) of the top rail to retain the struts in place. Thus, the apertures (62) are clearly capable of receiving a support structure or projection of a furniture unit even when mounted on the floor as seen in Figures 11, 16 and 17 of that patent. We again note, as we did supra, that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not

differentiate the claimed apparatus from a prior art apparatus satisfying the structural limitations of that claimed.

Accordingly, we find appellants' arguments directed at Amstutz to be unpersuasive as regards independent claims 31 and 44 on appeal and will sustain the examiner's rejection of those claims under 35 U.S.C. § 102(b).

As for dependent claims 32 through 41 and 45 through 49, we again find that appellants have not presented any separate argument for the patentability of these claims apart from that which was presented with regard to the independent claims (note, for example, the first paragraph on page 13 of the brief). Accordingly, we consider these dependent claims (i.e., claims 32 through 41 and 45 through 49) to again fall with the respective parent claim from which they depend.

On page 13 of their brief, appellant's have presented separate arguments with respect to dependent claims 43, 50 and 51. In reviewing claim 43, we note that the partition system of Amstutz includes leveling devices (44, Fig. 11), which leveling devices extend below the partition and are secured to the floor

channel. However, as has been argued by appellants' in their brief and reply brief, claim 43 on appeal requires the partition to include the levelers, with the levelers then being secured to the floor channel. This structure can be seen generally in Figures 77-83 of the present application, wherein the levelers (386) are part of the partition and are secured to the floor channel (380) by interlock brackets (426). Since, as can be seen in Figure 11, the levelers (44) in Amstutz are clearly part of the floor channel and not part of the partition supported thereon, we will not sustain the examiner's rejection of claim 43 based on Amstutz.

Further, giving claims 50 and 51 the same interpretation we indicated *supra*, we find that Amstutz does not disclose or teach a floor channel wherein the apertures are located "at the corner" (emphasis added) as defined in claim 50, or "in the corner" (emphasis added) as set forth in claim 51. Thus, we will not sustain the examiner's rejection of these claims under 35 U.S.C. § 102(b) as being anticipated by Amstutz.

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In summary:

The decision of the examiner rejecting Claims 31 through 42 and 44 through 51 under 35 U.S.C. § 102(b) as being anticipated by Pollock '386, is affirmed as to claims 31 through 41 and claims 44 through 49, but is reversed as to claims 42, 50 and 51.

The examiner's decision rejecting claims 31 through 41 and 43 through 51 under 35 U.S.C. § 102(b) as being anticipated by Amstutz, is affirmed as to claims 31 through 41 and claims 44 through 49, but is reversed as to claims 43, 50 and 51.

Accordingly, the decision of the examiner is affirmed-in-part.

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No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a).

AFFIRMED-IN-PART

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	
)	BOARD OF PATENT
CHARLES E. FRANKFORT)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
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JEFFREY V. NASE)	
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